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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR THE

COMMONWEALTH

Suffolk, ss.

Misc. No.

REPORT OF THE

SPECIAL COMMITTEE ON LEGAL EDUCATION

December, 1981

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REPORT OF THE SPECIAL COMMITTEE ON LEGAL EDUCATION
OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

I. General Statement of Position

A. Fundamental Premises

The Court has asked us to consider the state of skills training for lawyers in the Commonwealth and to indicate any steps which we believe might reasonably be taken to enhance professional competence in the areas of legal education, the bar examination, continuing legal education, specialization, certification and recertification. After interviewing a number of authorities in these matters, reviewing developments in other jurisdictions, and meeting regularly over a period of two years, we find that we have reached some definite conclusions and have certain recommendations to make to the Court.*

We have equated skills training with instruction in the application of legal principles and reasoning for the practical benefit of clients. Historically, such training has not been seen as the primary responsibility of our law schools which have rather concentrated on cognitive learning of legal materials and legal reasoning processes with relatively little emphasis upon clinical experience and applied learning. Skills training has

*The Committee has elected to speak with a single voice except in three instances hereafter footnoted. The members are not necessarily otherwise unanimous on every issue. However, we do all believe that the package of proposals presented for the Court's review warrants its serious consideration as a comprehensive and cohesive approach to the various matters referred to us for consideration.

been largely left to the Bar itself and has traditionally occurred in the course of de facto apprenticeships at the outset of practice. In recent years continuing legal education courses open to the Bar at large have also come to play a significant role in post-admissions training of this sort.

There are at least two forms of skills training: the offering of instruction in the general techniques of applying legal principles and reasoning for the benefit of clients (i.e., fact-gathering, negotiation, drafting, advocacy and client counseling) and the imparting of certain kinds of particularized or how-to-do-it knowledge necessary for the performance of basic legal tasks (i.e., what to include in a simple will, how to close a residential real estate transaction, and so forth).^{*} In recent years most law schools have begun to experiment with the former type of instruction; few, if any, law schools concern themselves with the latter type of instruction. To the extent that skills training of either type has been offered by post-J.D. continuing legal education courses, attendance at those courses has, of course, been purely voluntary on the part of lawyers practicing in Massachusetts.

Many lawyers are concerned that the de facto apprenticeship system--as supplemented by voluntary CLE programs--is no longer able to provide adequate skills training opportunities for large

^{*}Skills training is here being used in juxtaposition to training in the analytic processes by which lawyers apply legal principles to particular factual situations. It is a truism, but well-worth emphasizing here, that mastery of analytic "skills" is a necessary prerequisite to any effective application of law for the benefit of clients.

numbers of the law students now entering private practice*. The Massachusetts Bar effectively doubled in size during the last decade. This Commonwealth now has the highest percentage of solo practitioners in the nation--60%--as opposed to a national per-state average of 47%. What we do not know, with certainty, is at what stage in their careers these lawyers have become solo practitioners. Specifically, the Committee has been unable to determine just how many new members of the Massachusetts Bar have been forced to begin practice on their own during the last decade. However, the associate executive director of the American Bar Foundation has estimated for us that, as of 1980, 40% of all law school graduates go into solo practice upon initial admission to the Bar. Given the high over-all percentage of solo practitioners in the Commonwealth, we assume that Massachusetts at least equals the estimated national average for new lawyers going directly into private practice on their own following graduation from law school.

*Typical of this concern is the following excerpt from a letter which the Committee received from the dean of a major law school in one of our sister states:

"In my judgment, the topic under consideration takes on added significance in the light of the adverse climate for placement opportunities for new lawyers. Graduates of our School have had increasing difficulties in finding jobs of high quality. This does not reflect itself in unemployment, but it means that many young lawyers are starting their practice in positions that do not promise the final polish of professional training which lawyers generally regard as essential for the foundation of an outstanding legal career. More and more are accepting positions with marginal firms or institutions for whom high professional craftsmanship is not an important objective. Further, I am informed that economic pressures on large firms are resulting in some impairment of the in-house training which in the past has distinguished such practice."

The present format of the Massachusetts Bar Examination provides adequate opportunity to measure an applicant's capacity to analyze problems from a legal point of view, the so-called process of "thinking like a lawyer". It does not provide for testing the applicant's ability to apply his or her legal analysis for the practical benefit of a client. This is not to say that the Bar Examiners have been recommending the admission of "incompetent" lawyers, but rather that the potential exists for lawyers to become licensed without proficiency in applying law for the practical benefit of clients. At a time when a period of apprenticeship was assumed to follow admission to the Bar, that potential was not a source of concern. Under present circumstances, however, it is.

Not surprisingly, we have been unable to devise any reliable method for wholesale measurement of the skills level of existing Massachusetts lawyers. For what it may be worth, the perceptions of four highly qualified persons who appeared before us and a review of the complaints filed with the Board of Bar Overseers during the last 18 months would suggest that it is likely that a relatively small, but nevertheless significant, percentage of Massachusetts lawyers may be performing incompetently with some frequency. In that context we do not mean to suggest that instances of incompetence are limited to new lawyers. To the contrary, such is undoubtedly not the case.*

*One committee member has encountered three separate instances of gross incompetence in the space of the last two months: failure to assert attorney-client privilege during deposition, volunteering to dismiss with prejudice a complaint attacked on purely procedural grounds, and waiver of a good claim for damages in order to avoid a contested hearing. In two instances lawyers with about three years experience were involved. In the third a lawyer with many years of practice was involved.

We have been able to satisfy ourselves that there has been no rash of lawsuits charging malpractice attributable to professional incompetence. Neither the Board of Bar Overseers nor the Public Protection Bureau of the Attorney General's Office perceive any untoward volume of client complaints about the competence of lawyers.

While the Massachusetts Bar presently does not display signs of pervasive incompetence, we are concerned about maintaining a high level of proficiency at a time when such large numbers are joining the Bar and the classic system for training them appears to be inadequate. Moreover, the mere fact that we find no evidence of wide-spread incompetence does not persuade us in any event that this Court should necessarily be content with the status-quo. To the contrary, there are obvious steps which might reasonably be taken in an effort to enhance the prospects for competence, including measures which hold promise that they will be fruitful for all members of the Bar, not just new lawyers.*

B. Summary of Recommendations

Based upon the foregoing premises, we believe that implementation of each of the following nine affirmative measures deserves consideration by this Court:

1. Formation of a board of equal standing with the Board of Bar Overseers and the Board of Bar Examiners to provide continuing assistance to the Bar in the attainment, maintenance

*Our primary focus has been upon the situation of lawyers in private practice. It could be that the issues of competence facing lawyers who work for government, for legal services organizations, for business corporations and for insurance companies warrant separate examination.

and enhancement of proficiency in applying law for the benefit of clients.

2. Institution of a Mandatory Practice Course -- to be modeled after MCLE-NELI's existing "Practical Skills Series" -- to be given after the Bar Examination and prior to admission to the Bar.

3. Determination of the extent to which a shift in emphasis of the Bar Examination towards requiring applicants to demonstrate a minimum proficiency in applying law for the benefit of clients may be feasible.

4. Provision of an experienced mentor for every newly admitted lawyer who desires to have such tutelage available during his or her first two years of practice, and establishment of a system of rotating panels of experts in various areas of the law to whom a mentor may, if necessary, refer an advisee for consultation in a particular matter.

5. Development of post-graduate certificate programs in areas of generally recognized legal concentration, the programs to be sponsored jointly by interested Massachusetts law schools and CLE organizations and to focus upon the professional needs of practicing lawyers three-to-eight years out of law school.

6. Creation of a Peer Support Panel to design and supervise remedial programs for lawyers who evidence significant inability to function competently in an area or areas of their practice.

7. Circulation for every CLE program of a standard form of prospectus which has been approved in advance by an

impartial representative of this Court and assigned an experience rating such as "Introductory", "Advanced Beginner", "Intermediate" or "Advanced".

8. Furnishing every active lawyer with a detailed summary (prepared under the supervision of the new board) of changes in Massachusetts and federal law of general significance during the year preceding his or her last registration with the Board of Bar Overseers, and requiring each active lawyer to certify that he or she has mastered such information prior to applying for re-registration.

9. Discussion by the Massachusetts law schools and the Massachusetts employers of law students with respect to whether a measure of formal law school involvement could usefully be introduced into the skills training which necessarily occurs during summer clerkships and term-time employment.

We also have five firm negative recommendations to make.

10. We do not support conditioning plenary admission to the Bar upon completion of a formal clerkship which occurs after the Bar Examination has been passed.

11. We do not support the concept of mandatory continuing legal education.

12. We do not support any proposal for the certification or self-designation of specialists at this time.

13. We do not support the imposition of any specific experience requirement as a pre-requisite for trying a case in the Superior Court Department of the Trial Court of the Commonwealth as lead counsel.

14. We do not recommend experimentation with recertification at this time.

C. Discussion of the Affirmative Recommendations

Recommendation No. 1

To begin with, our perceptions as to the inadequacies of the institutions currently available to provide post-J.D. skills training have led us to conclude that the creation of a separate body charged with devising ways to develop, maintain and improve the proficiency of lawyers would be timely. It is clear that the formal responsibility for the level of competence of the Massachusetts Bar lies with this Court. Yet neither the law schools nor the bar examiners are presently representing to the Court that law school graduates who have passed the Bar Examination are actually proficient in applying law for the benefit of clients. If we are correct that there are insufficient de facto apprenticeship opportunities for a large number of the new admittees each year, then efforts beyond those of our current CLE organizations are needed if we are to ensure that all new lawyers have access to the means of attaining and maintaining competence.*

By necessity, a period of experimentation will be necessary to implement and evaluate possible solutions. Provision for a separate group to supervise that experimentation on a continuing

*We do not mean to minimize the importance of our existing CLE organizations in post-admissions Bar training. It is simply that we believe that other mechanisms may also be available to assist lawyers in the transition from student to practitioner.

basis under the aegis of this Court appears to us to be an integral part of any such effort. There are no easy paths to ensure or to enhance the competence of the profession taken as a whole. We believe that a board of general jurisdiction in this area could play a positive role in the evolution of the profession if it is perceived by the Bar as a source of support and not of harassment*.

Recommendation No. 2

As to our recommendations for specific experimental efforts, we place by far the most emphasis upon the institution of a Mandatory Practice Course. In Ontario, the equivalent of our bar review courses is a formal six-months Bar Training Course conducted by the Law Society of Upper Canada. In place of our type of Bar Examination which emphasizes analytic skills almost to the exclusion of practical skills, Ontario presents the applicant with a sequence of inquiries into the practical application of legal principles and reasoning for the benefit of clients in concrete situations. Our Mandatory Practice Course is intended, in part, to explore the potential of such an approach to licensure without jettisoning the traditional bar examination at this time.

*We have not given any detailed consideration to methods of financing the administrative costs of operating a new board of this sort. However, one obvious source of funding would be the imposition of a modest fee in connection with the board's proposed review of the prospectus for each CLE program to be given hereafter in the Commonwealth. See Recommendation No. 7.

We recommend compulsory attendance at the Mandatory Practice Course, which should consist of some 30-to-60 hours of lectures and demonstrations, as we envision it*. The course should

*Dean Howard I. Kalodner dissents from this recommendation in the belief that unless the committee can determine the nature and degree of lawyer incompetence it cannot justify its conclusion that making mandatory a post-J.D. course which is now taken voluntarily by 60% of all new lawyers will reasonably tend to enhance the competence of the remaining 40% who would not otherwise take it. He does not find any basis for believing that 30 to 60 hours of lectures and demonstrations are likely to provide an effective tool to accomplish either of the two kinds of skills training discussed in the opening section of this report. He does not believe that MCLE-NELI's existing Practical Skills Series is sufficiently evolved, let alone adequately tested, to warrant making attendance mandatory. He does believe that experiments now being conducted in law schools may eventually lead to an adequate basis for imposing this type of requirement on those who are entering the ranks of the practicing Bar, but do not justify doing so at this time nor in the form of the course recommended in the text.

Dean Kalodner was unable to participate in the final sessions of the committee during which we forged our recommendations. Considerations such as those which he raises were conscientiously discussed in some detail and resolved in favor of the committee recommendation.

include a series of skills-oriented, written exercises designed to acquaint the student with satisfactory standards for preparation of a simple will, or representation of a client at a residential real estate closing, or the like. The exercises should be designed to emphasize to the Bar applicant what can be learned from the Mandatory Practice Course materials and to develop data as to what students are able to absorb from such a course. There would, however, be no examination, as we envision the course at this time*.

There should be a definite time limit on the experiment. We recommend a period of at least five years, but no more than ten. The burden would then shift to the proponents of a Mandatory Practice Course to persuade the Court that it should be continued.

We recommend that ultimate responsibility for the Mandatory Practice Course be vested in the Board of Bar Examiners.

*As of February, 1982, New Jersey will be admitting new lawyers on the basis we recommend except that it will require "satisfactory completion" of the practical skills course. The sponsor of the New Jersey course, the Institute for Continuing Legal Education, grants a certificate of completion to those students who "pass" a series of written exercises.

This Committee was more divided on the issue of the need to test for comprehension of the content of a skills course than on any other. Nevertheless, a clear majority was opposed to testing on the ground that the techniques both for teaching and for testing skills are not yet sufficiently developed to make it fair to exclude applicants from admission to the Bar on the ground that they lack adequate skills. All of us, however, recommend some limited experimentation with the format of the bar examination itself in an attempt to gain experience in this general area. See Recommendation No. 3.

However, the Board should have the co-operation and assistance of the members and staff of the new board which we also recommend be appointed by this Court.

Recommendation No. 3

Our third recommendation is for a continued examination of the issues involved in changing the nature of the present Bar Examination to include formal testing of the applicant's skills level*. The development of skills is inherently a function of experience. We can probably never expect new lawyers to be truly proficient in applying law for the benefit of clients until they have had some sustained exposure to practice. If we want the bar examiners to certify that an applicant is thoroughly competent to engage in private practice on his or her own from and after licensure, then we are probably going to have to shift to a system of conditional licensure upon graduation from law school and to an examination for plenary licensure which endeavors to test skills levels. In conjunction with such a system, law schools might properly be asked to give some kind of a comprehensive general examination before awarding the J.D. degree.

On the other hand, conditional licensure might well be exploitive of the graduating law student without compensating social benefits. For some students it could defer the economic rewards of a law degree for an unconscionable length of time. For others it could mean lack of access to the types of clerkship

*The Board of Bar Examiners has informed us that it has been considering for some time recommending to the Court the addition of a practical skills component to the current bar examination.

experience which might be critical to answering certain types of skills-oriented questions in a satisfactory manner.

We also do not know how well, if at all, we really can either teach or test skills in a group setting. Many lawyers "rise to the occasion" and perform best under the stress of a concrete adversary situation. The reverse is sometimes true as well. A knowledgeable lawyer can "give up too much" under the pressure of a forceful adversary's relentless personality. For the corporate lawyer, drafting under time pressure to save a closing is entirely different from writing in comfort and leisure in one's own office.

Having these considerations in mind, as well as others which space requires us to leave unstated here, it seems wisest to continue the basic form of the Bar Examination, but to evaluate its role critically in the light of the experience developed in offering the Mandatory Practice Course. If we are correct that there is no substantial evidence of a "competence crisis" within the Massachusetts Bar at this time, then we can afford to proceed with a measure of deliberation in this area.

However, the Bar Examiners should be encouraged to experiment with the use of skills-oriented questions on the Bar Examination in the next few years. One or two subjects, such as commercial law or real estate, might be selected in advance for a question or questions designed to probe the applicant's understanding of how law can be constructively applied in a practice setting. With sufficient warning we believe that the

bar review courses will readily respond to the need to prepare students for such exercises*.

Recommendation No. 4

A well-conceived voluntary mentor program offers hope of compensating for any dearth of good training opportunities for new practitioners. We believe that the various bar associations throughout the Commonwealth will be willing to take the initiative in recruiting the cadre of experienced lawyers needed to provide an experienced "mentor" for every new lawyer who desires such a source of practical advice during the first two or three years of practice. Any mentor, in turn, should be able to refer an advisee to a member of a rotating panel which possesses "area expertise" in a variety of fields of practice, such as trial, conveyancing, probate and corporate. Both mentors and expert advisors should be allowed to do no more than consult with the new lawyer and should be prohibited from becoming directly involved in representing the new lawyer's client. If new lawyers will seize the opportunity to gain access in this manner to knowledgeable experienced attorneys, the general level of competence of new members of the Bar could increase markedly in our opinion.

*Bar review courses have no formal status in the training of lawyers in the sense that one need not have attended such a course in order to sit for the bar examination. However, well over 90% of new lawyers have taken such a course, and the time may well be at hand to recognize the phenomenon of the Bar Review Course and confer upon it a particular role in the development of professional skills along the lines of the Ontario Bar Training Course described in the text at page 9.

Some aspects of our mentor proposal have been tried before without marked success. However, a comprehensive approach involving both individual mentors and panels of experts appears to be unique. Also unprecedented is our suggestion that the state's highest court designate the experienced lawyers and assume direct responsibility for the program through our recommended board of general jurisdiction in the area of professional competence. If at all possible, the mentors and advisors should receive an honorarium.

We are hopeful that our mentor program can be structured in such a way as to enlist the enthusiastic support of the major law firms. In the best of all possible worlds we would like to see such firms compete with each other as to the quality of the skills training available under their respective mentorship programs.

Obviously, an established firm could itself provide each new associate with an in-house mentor, and access to area experts would occur without formality and as a matter of course. In the larger firms the cadre of in-house mentors would presumably assume responsibility as a group for in-house skills training. One major New York law firm has recently required all its associates to take a writing course. One can also visualize firm-wide presentations in counseling and negotiating techniques. On another front, "office manuals" for depositions, real estate closings, estate planning conferences and the like could usefully be explicated for the benefit of all associates.

It has long been a fear of associates entering large law firms that they will be forced to specialize to such a degree that they will be unable to earn a living in private practice if a partnership does not eventuate. A firm's mentorship program could address this concern directly by offering in-house training in skills applicable to a variety of areas of practice.

Any mentorship program initiated by this Court could also assume responsibility for the training under the supervision of the new board of recently admitted lawyers to serve as voluntary defenders, juvenile advocates and legal-service attorneys. Many starting lawyers, we believe, would welcome the opportunity to appear in court in these capacities under the tutelage of an experienced senior. A justice of the District Court Department of the Trial Court of the Commonwealth has invited our attention to the established need for such a program in the Juvenile Session of his court.

Again we perceive a role for a board of general jurisdiction which can review bar association nominations and ensure that appointments to serve as legal advisor will be of uniformly high quality. Thought needs to be given by a disinterested group to such matters as frequency and duration of mentor-new lawyer contacts, reporting by mentors and new lawyers alike as to the value of the program, publicizing of the program and possible development of directly complementary educational activities.

Recommendation No. 5

We put very considerable emphasis upon the importance of developing the appropriate curriculum for a series of extended

post-graduate CLE-sponsored courses which will enable lawyers to obtain post-J.D. certificates in a number of recognized areas of practice such as trial work, corporate matters, estate planning and conveyancing. The objective should be to develop lawyers well-qualified to concentrate in particular areas of the law after approximately five-to-eight years of practice.* In essence we have in mind trying to foster programs somewhat like the Boston University Law School's graduate program in taxation for other areas of the law, but with perhaps greater emphasis upon the practical application of an advanced understanding of the law in a given area to the solution of recurring client problems in that field. Law school participation in the development of the kinds of courses suitable to particular areas of practice would seem to us to be critical. Because of the number and quality of the law faculties in the Commonwealth, Massachusetts appears to be peculiarly well-situated to sponsor such an experiment.

However, we again perceive the need for a board appointed by this Court which can give focus and direction to the effort which we recommend. That board should be authorized to certify or approve in some manner the programs which particular CLE organizations may wish to offer to the Bar.

Recommendation No. 6

The recommendation as to the creation of a Peer Support Panel is also a matter of considerable moment so far as we are

*To achieve this goal, training should begin when a lawyer has been at the Bar for approximately three years. Thus, long-term education suitable for area concentration would pick up more or less where the mentorship program ended.

concerned. We find that the profession clearly needs a formal mechanism for dealing on a wholly confidential basis with those instances of incompetent performance which do not appear to warrant serious disciplinary proceedings. The Peer Support Panel would be charged with developing and supervising individualized programs of remedial assistance for attorneys who have manifestly performed in a less-than-competent manner on a number of occasions.

Of equal importance is the need to provide support for lawyers returning to active practice after a period of suspension or even disbarment. At present, the profession has no way of maintaining formal contact with lawyers who have erred, been subjected to discipline, and then returned to the ranks of the active bar.

Lawyers can perform below their actual capabilities for a variety of very human reasons--alcoholism, drug dependence, marital stress, overwork and chronic ill health, to name a few. Commonly their derelictions on behalf of their clients do not warrant discipline beyond a reprimand. The existence of a Peer Support Program would be a highly desirable alternative method of dealing with such situations in a manner designed to uncover and treat the underlying problem which induced the unsatisfactory professional performance.

Nor is it unrealistic to believe that remedial programs can be developed for lawyers whose skills level is demonstrably

unsatisfactory. Given the right peer attitudes and a confidential setting many lawyers would undoubtedly participate willingly in refresher and training courses designed to enhance basic skills.

A Peer Support Panel should report to the board whose creation we recommend. The types of problems brought to such a panel and the nature of their solution will be of clear significance to that board in its other areas of activity.

Recommendations Nos. 7 and 8

The recommendations as to CLE - a standard form of course prospectus and the annual circulation of materials dealing with changes in Massachusetts and Federal law of general significance to all practitioners - seem to us to be in the nature of good housekeeping which is long overdue. While neither may have any wholesale effect upon competence, each will substantially assist those lawyers who do conscientiously endeavor to keep current. Again, the board whose establishment we propose should be the entity to supervise these two experimental activities.

Recommendation No. 9

Our final affirmative recommendation--further consideration of greater involvement of law schools in off-campus, clerkship training experiences--does not contemplate immediate action on any one's part. We intend to plant a seed for thought. Further cultivation, if any, will depend upon our successors.

D. Discussion of the Negative Recommendations

Recommendation No. 10

As to the first of our negative recommendations, we note that Vermont continues to have a formal clerkship requirement. However, the experience of a more comparable jurisdiction like New Jersey in recent times is that often the clerk provides valuable services to the veteran lawyer while receiving little in the way of useful instruction in the art of practicing law. We prefer to recommend experimentation with a mentorship program which will provide voluntary access to experienced lawyers, but afford safeguards against inappropriate mentor involvement in actual client representation.

Recommendation No. 11

So far as mandatory continuing legal education is concerned, we are impressed by the report that a 1980 survey of the Minnesota Bar shows that 87% of the lawyers in that state believe that mandatory CLE has improved their competence*. However, we conclude that compulsory attendance in this setting would be resented and would not be conducive to learning so far as many practicing lawyers are concerned. Participation in 15 hours of CLE a year (the norm in states which have a CLE requirement) offers no inherent assurance that a lawyer will in fact increase

*The Minnesota Bar is polled annually on this issue and the related questions as to whether mandatory continuing legal education raises the level of law practice generally and as to whether such education should be continued in its present form. In 1980, 76% of those polled believed that the level of practice is raised by a mandatory program, and 87% believed that the program should be continued in its present form.

his or her professional ability significantly. An appreciable number of lawyers will probably be forced to attend programs in which they have no particular interest. Attendance requirements will probably be honored in name only by a significant portion of the Bar. In our view, some coherent curriculum based around "Recent Developments in Federal and Massachusetts Law" would have to be devised to make the requirement an educationally meaningful one for a very large percentage of those forced to attend. As to the last of these issues, we believe that a system of self-certification to the Board of Bar Overseers, as noted earlier, will be more readily acceptable to the Bar.

Recommendation No. 12

We find that the so-called self-designation plans for indicating area-concentration to the public contain a substantial risk of misleading the consumer. These plans, which are prevalent in the Southeast, reflect no attempt to verify competence. The states which do test before certifying specialists--California, Texas and Arizona--ignore the larger problem of how to train and develop specialists. This Committee believes that the latter is the most critical issue in evaluating the fairness of any certification plan. Until there is a clear path for all lawyers to follow if they want to become certified specialists, the certification of existing de facto specialists is likely to have an exclusionary effect upon access to the kind of experience which will permit development of specialist status by those who have not yet attained that level. On that ground we recommend deferring any implementation of the ABA Model Specialization Plan at this time.

We recognize that there are substantial counter arguments that the public and other members of the Bar may suffer as a result of a gap in the structure of the profession which can be readily closed if there is public identification of lawyers who have been certified to possess specialist-level expertise in particular areas. Delay in implementation of a certification program tends to harm the public interest in the near term to the extent that difficulty in identifying competent counsel may increase the risk that some specialist-level matters will be handled inappropriately. That risk must obviously be balanced against the risk that creation of a specialist class before there are proven programs in place for training new lawyers to become specialists may exclude unfairly from certification those who do not now possess the necessary credentials and thus also harm the public interest in the long run.

There is much to be said on both sides. A substantial majority believes that our Recommendation No. 5 is designed to address this general subject of specialization constructively. That group concludes that once MCLE-NELI and the Massachusetts law schools have developed extended post-J.D. training courses in the recognized areas of practice concentration (trial, corporate, securities, tax, labor, real estate, and so forth), there will be time enough to re-examine the issue of formal certification of

specialists*. In the meantime, the existing prohibition of the advertising of specialist skills should be concluded.

Recommendation 13

With respect to the related issue of an experience requirement for lead counsel in the trial of cases in the Superior Court, we do not recommend that the aspect of the Devitt-King Recommendations which calls for the creation of a Federal Trial Bar based, in part, upon an experience requirement be implemented in like kind at this time in the Trial Court of the Commonwealth. We do not in any way denigrate the critical importance of prior experience in trying cases. However, the quality of the trial experience available to most new Massachusetts lawyers is simply too uneven to provide any assurance that after four simple trial experiences, including law school training, a young lawyer should be considered to possess the minimum competence to be able to conduct a serious civil or criminal trial in the Superior Court Department. It is self-evident that the more uneven the experience of various applicants has been the more the imposition of a numbers requirement (like four "qualifying" experiences) is likely to become arbitrary and capricious.

*Richard C. Csaplar, Jr. and Theodore T. Orenstein record their dissent. They believe that the public and other members of the Bar are presently entitled to have lawyers certified as having met objective specialist standards in given areas. They believe that the possible intra-professional exclusionary effect of certification must give way to that public interest. They do, however, agree wholeheartedly that we also need a program or programs for the training of potential certified specialists.

One distinguished Justice of the Trial Court, who is actively involved in the continuing MCLE-NELI efforts in this area, opined to the committee that the basic problem he sees is lack of preparation, not lack of experience. However that may be, we believe the problem of the competence of trial lawyers should be addressed within the larger context of enhancing the competence of all lawyers. Specifically, an extended post-J.D. course in trial practice is among the extended specialty-area training programs which we would like to see MCLE-NELI and other CLE organizations develop in conjunction with the Massachusetts law schools for lawyers who have been in practice for three-to-eight years. See Recommendations Nos. 5 and 12.

On the other extreme, we admit that we are reluctant to see this Court take even preliminary steps towards the creation of a barrister class. Hard cases in our society are sometimes brought by relatively inexperienced counsel who might hesitate to take on an unpopular cause if they were better established. Essentially unlimited access to the Courts is arguably fundamental to an open society. In some instances it may be only an inexperienced advocate who is willing to demand that access for his or her client.

A caveat is appropriate. If the United States District Court for the District of Massachusetts decides to implement an "experience requirement" for membership in a separate Federal Trial Bar, then this Court may be forced to consider imposing a

parallel program in the Superior Court Department. A bifurcated trial bar--state and federal--would be a radical departure from American legal history to this point. There is no one, we submit, who seriously contends that a Superior Court trial in a complex matter requires any less skill than does one in the Federal Court. Requirements for admission to both Bars should be a matter of parity.

Because of the potential for a bifurcated Bar implicit in an experience requirement for the one, but not for the other, we prefer to see the Federal District Court join in the sponsorship of CLE-originated trial practice courses of proven quality for all would-be courtroom lawyers rather than to institute at this time a lead counsel limitation based upon prior experience, the quality of which will not be subject to verification.* As with specialization generally, we do not believe that there should be any risk of "exclusion" until the necessary training mechanisms to enable any lawyer to avoid exclusion are in place and functioning satisfactorily. See Recommendation No. 5.

Recommendation No. 14

Our final negative recommendation pertains to compulsory recertification. We have not had time to evaluate such proposals

*Robert W. Meserve, Esq., a member of both the Devitt and King Committees, necessarily dissents from this alternative recommendation. To the extent that our primary recommendation in this area might also be read by some as being inconsistent with the conclusions of the Devitt and King Committees, Mr. Meserve would also feel constrained to dissent from that position as well. However, he does not believe that such an inconsistency exists, but rather concludes that ensuring the competence of the state trial bar presents a different set of issues (which are appropriately addressed through the proposed long-term CLE training program) from those involved in dealing with a court which, like the federal court, is exclusively for trial advocates.

in any depth. We know of no jurisdiction which is even considering implementing a proposal of that sort. Given our general finding that there is no substantial evidence of wide-spread incompetence at the Bar, we believe that the question of recertification does not require priority attention at this time. Moreover, we note in our Findings and Conclusions that several of our recommendations tend to address the issues which are implicitly raised by the concept of recertification.

E. Conclusion

Taken as a whole, our recommendations contemplate a period of controlled experimentation under the aegis of this Court with certain measures which we believe are reasonably calculated to enhance the over-all competence of a lawyer at critical stages of his or her career. The recommendations seek to develop further information as to when and how skills can best be taught--in pre-admission clerkships, in a special Bar training course, through a mentorship program or via extended CLE instruction. Doubtless the answer will be that each of these structures offers some advantages and some disadvantages, so that there is no single, easy way to train an effective practitioner. However, by implementing a number of approaches to the problem of skills training at different stages of professional growth and by providing coordination from a board appointed by this Court, we

believe that much progress can be made in the next decade towards ensuring the high level of professional ability which the public deserves.

We know that the ultimate test of a lawyer's competence frequently turns upon an intangible which cannot be measured--possession of the determination to see a client through to the best result available under the circumstances. External structures can support and sustain that will, but they cannot implant it. Nevertheless, by establishing a body specifically charged with maintaining a climate in which high levels of competence are the norm and not the exception, we believe this Court can do much to supplement each individual lawyer's own initiative. This Committee would be pleased to serve in an advisory capacity to any such body for whatever transition period might be necessary to ensure continuity in our work and thinking to date.

In the alternative, we are prepared to remain in existence and to continue to explore the matters entrusted to us. In that event we respectfully ask the Court to consider appointing a reporter (or providing us with funds to hire such a functionary ourselves) to assist us in our field work and in the formulation of detailed remedial proposals.

II. Findings and Conclusions

A. The State of Skills Training in General

1.0 In considering the concept of "skills training" it is essential to differentiate between two distinct components: the

development of facility in certain techniques for the application of legal principles and reasoning for the benefit of clients (e.g., fact-gathering, negotiation, advocacy, drafting and client counseling) and the acquisition of certain kinds of process or "how-to-do-it" knowledge necessary for the performance of basic legal tasks (e.g., "Fifteen Basic Steps in Closing a Real Estate Transaction" or "How to Draft a Simple Will and Trust").

1.1 In this Report the term "skills training" is used to designate schooling both in the techniques and in the particularized process knowledge necessary for applying legal reasoning and principles for the practical benefit of clients.

1.2 The objective of skills training, as we have understood the term, is necessarily to attain "competence" in applying law for the practical benefit of clients in a given area or areas. For our purposes the competent lawyer is one who is reasonably proficient in the practical application of legal knowledge and principles in a given area of the law.*

*The Court will also want to consider in this context a more comprehensive definition of "competence" adopted by The American Law Institute -- American Bar Association Committee on Continuing Professional Education for purposes of "A Model Peer Review System":

"Legal competence is measured by the extent to which an attorney (1) is specifically knowledgeable about the fields of law in which he or she practices, (2) performs the techniques of such practice with skill, (3) manages such practice efficiently, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) properly prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically capable. Legal incompetence is measured by the extent to which an attorney fails to maintain these qualities."

1.3 All of the Massachusetts law schools currently offer some formal instruction in at least some of the techniques for applying law for the benefit of clients. Few, if any, offer much in the way of instruction designed to develop detailed process knowledge essential to the performance of particular tasks. Almost all law schools do offer a combination of simulated experience and participation in a legal aid, voluntary defender or student prosecutor program which affords the interested law student some opportunity to begin to master both process knowledge and advocacy techniques in the area of trial practice. Relatively little clinical experience is available through the law schools themselves in the domain of the so-called office lawyer.

1.4 The "Practical Skills Course" offered by Massachusetts Continuing Legal Education-New England Law Institute ("MCLE-NELI") for many years has afforded the best opportunity for newly admitted Massachusetts lawyers to acquire the process knowledge necessary to perform basic legal tasks effectively.*

*This course has been expanded for 1981 as a Practical Skills Series to be given in four subject areas: Real Estate, Business, Estate Planning and Probate, and Trial. MCLE-NELI is a non-profit organization providing continuing legal education both for Massachusetts lawyers and for the New England Bar generally.

It is MCLE-NELI's best judgment that approximately 50% of all practicing Massachusetts lawyers have taken this course, which is now in its seventeenth year.* An estimated 50% of all newly admitted lawyers currently take the course, and another 10% probably take it within five years of admission.

1.5 Historically speaking, competence in the application of law was supposed to be acquired by American lawyers during the course of a formal apprenticeship with a licensed practitioner (the so-called practice of "reading for the Bar"). Following the collapse of formal apprenticeship training, there developed a system of de facto apprenticeships whereby newly admitted lawyers customarily had their first job in an established law office and were able to develop professional skills through supervised on-the-job training.

1.6 In Massachusetts and the other American jurisdictions the de facto apprenticeship system evolved hand-in-hand with the growth of so-called corporate law offices which enjoyed sufficient professional and financial resources to provide job settings in which junior lawyers could be closely supervised by qualified seniors.

*There were 26,000 lawyers registered with the Board of Bar Overseers on August 31, 1981, of whom roughly 22,000 were active, according to the records of the Board. However, as few as 14,000 may actually be practicing in the Commonwealth. Of those, an estimated 7,500 have taken the MCLE-NELI skills course at some point in their careers.

1.7 The Twentieth Century growth of government--federal, state and local--and the concomitant increase in the numbers of lawyers in governmental offices and on the staffs of quasi-governmental bodies has also created a large number of de facto apprenticeship opportunities for new lawyers.

1.8 While large corporations have tended to build up large in-house legal staffs, such businesses rarely recruit novice lawyers, but concentrate upon those who have already acquired a measure of experience.

1.9 We know that the size of the Bar has doubled within the last decade based upon the total number of lawyers admitted to practice. Although reliable current statistics as to the character of the initial employment obtained by Massachusetts law school graduates are not available, we do know that 60% of all lawyers engaged in private practice in Massachusetts are practicing alone. See 1981 ABAJ 1098-1099. Copy attached as Exhibit A. We have also been furnished with an estimate by Barbara A. Curran, associate executive director and research attorney for the American Bar Foundation, that, as of 1980, 40% of all new lawyers were going directly into private practice. See letter from her to Ansel B. Chaplin, Esq., dated December 21, 1981, of which a copy is attached hereto as Exhibit B. If Massachusetts at least equals that national average, which seems likely, then the case would appear to be established that very substantial numbers of new lawyers are no longer receiving the benefits of the old de facto apprenticeship system.

1.10 The Committee concludes that openings for novice lawyers of a type which afford effective on-the-job skills training have not kept pace with the recent growth of the Bar. We further conclude that an effort should be made to devise structural alternatives which can attempt to provide the equivalent of de facto apprenticeship training for lawyers who do not have access to jobs in established offices.

B. Legal Education

2.0 The Massachusetts law schools, and American law schools generally, do not represent to the courts that one of their graduates is able to practice law competently as of receipt of a law degree. Here it is appropriate to recall our definition of competence as the possession of reasonable skill in the practical application of law for the benefit of clients.

2.1 Historically speaking, skills training has not been seen as the primary responsibility of our law schools which have rather concentrated on cognitive learning of legal materials and legal reasoning processes. For our purposes traditional legal education can be termed "conceptual training" as opposed to "skills training".

2.2 However denominated, the development during law school of facility in legal reasoning processes is the fundamental ability which underlies proficiency in the application of law for the practical benefit of clients. Absent a sound legal analysis of a given situation no amount of skill in negotiating or

drafting or whatever is likely to produce a satisfactory result for the client.

2.3 Law schools typically do not require their students to pursue any "clinical" course of study (i.e., actual or simulated involvement in the practical solution of common client problems under academic tutelage). Rather the law schools have assumed that almost all law students will develop the necessary practice skills under the tutelage of experienced lawyers in their initial job experiences.

2.4 The decades of the '60s and '70s witnessed increasing academic interest in trying to teach skills (in the sense of techniques for applying law) to law students and in fostering clinical education generally. Courses have been attempted in such "novel" areas as negotiation. Intensive trial advocacy courses became available at some institutions. In traditional courses professors made an increased effort to relate substantive legal principles to practical practice settings.

2.5 The Massachusetts law schools have also sponsored off-campus clinical activities by their students. Representative of these activities are the programs available at Boston College Law School (Legal Assistance Bureau, Lawyering Process Course, Urban Legal Laboratory, Juvenile Justice Seminar, Advanced Civil Litigation Course, Criminal Process Course, and Attorney General Law Clinic). See "Boston College Law School Clinical Course Offerings for the 1979-1980 Academic Year", of which a copy is attached hereto as Exhibit C. Suffolk University Law School sponsors an Outside Clinical Studies Program in which a student

may enjoy a supervised for-credit placement with a court or in a governmental department or agency. See Exhibit D. Northeastern University Law School goes a step further and makes periodic full-time, off-campus, law-related placements a formal portion of its work-study curriculum.

2.6 This relatively mild shift in orientation by most law schools towards increased emphasis upon the practical application of law has not met with uniform acceptance by law school faculties. It is not clear at this time how much of the curriculum experimentation in this area will (or should) be retained.

2.7 There are unquestionably inherent limits as to the extent to which skills of either type can be effectively taught through simulated practice settings. Education under the guidance of a dedicated and skilled mentor in a one-on-one setting after graduation from law school is still unquestionably the most effective system of "skills training". Many "tricks of the trade" probably cannot be grasped outside a true-to-life practice setting in which the neophyte lawyer has a direct sense of responsibility to an identifiable client, and in which an experienced lawyer provides close supervision.

2.8 The largest source of potential skills teachers is the practicing Bar. It would probably be feasible for a law school to recruit an adjunct clinical faculty of lawyers primarily engaged in private practice if such a step were thought to be desirable.

2.9 It might well be feasible for a law school to associate itself with one or more "teaching law firms", some or all of whose members were adjunct professors at the law school, if such a development were thought to be useful. In the alternative, it is certainly feasible for law schools to develop affiliated legal clinics whose professional staff are adjunct faculty members. The University of Maryland already has such a program, for example.

2.10 The Massachusetts law schools are not attempting to supervise the quality of the skills training which is made available to their law students by private and governmental employers during first- and second-year summer clerkships or through term-time employment. An interesting exception is Northeastern which has successfully placed its students in high-quality practice settings under the direct supervision of able attorneys as a formal portion of its work-study curriculum. Northeastern monitors the students' experience and does not renew those placements which do not offer a high degree of supervision. However, the Northeastern faculty does not directly participate in the supervision of the students' work for an independent employer.

2.11 It is unlikely that private sector employers of Massachusetts law students would welcome attempts at academic supervision or even formal academic liaison with their clerks. It is not clear whether such employers would be in a position to

reject some degree of academic involvement if the law schools were prepared to insist upon it as an essential aspect of a law school's role in the training of lawyers. However, it is also unclear whether the experience offered by a typical clerkship could in fact be significantly enhanced by a measure of academic supervision or liaison. Nevertheless, the Northeastern experience indicates that exposure to practice can be successfully mixed with traditional academic values to an extent which suggests that an even greater degree of academic involvement could be tolerated by the practicing bar.

2.12 The Legal Services Institute, jointly sponsored by Harvard, Northeastern and the Legal Services Corporation, is offering an experimental clinical third year of law school for prospective legal assistance lawyers. The students handle actual cases through the Jamaica Plain Legal Services Office under the supervision of experienced lawyers who are faculty members at their respective law schools. The Legal Services Institute is one of the most innovative developments in the history of legal education and will soon give us insight into the feasibility and desirability of incorporating intensive clinical experience into the required curriculum for all law students.

2.13 The issue of academic freedom as it relates to this Court's legitimate interest in the quality of legal education is a complex one. Since the law schools are the sole source of legal education for the lawyers who will eventually appear before

the courts, the judiciary has a legitimate interest in the effectiveness of that education in producing able and qualified practicing lawyers. Law schools are nevertheless independent educational institutions. Not all of their graduates will undertake to practice law, and many practicing lawyers will eventually leave practice for other areas of activity. Law schools should not be expected to serve as the exclusive source of professional skills training and are entitled to assume that the would-be practitioner will have an opportunity to develop and hone application skills to proficiency at some other point in time.

2.14 While the courts should be slow to impose Bar Admission requirements which directly or indirectly structure a law school's curriculum, the law schools should nevertheless be generally responsive to the need to train students who can cope with the practice settings in which law is actually applied for the benefit of clients, and should thus be prepared to assume some measure of responsibility for how students are to be trained in the techniques and processes for putting legal principles to work.

2.15 It is the experience of MCLE-NELI that the new lawyer's perception of the need for skills training in the application of legal knowledge is highest two-to-three years after graduating from law school.

2.16 We conclude that it is not clear how much effective skills training during the law school years can take place

outside an actual practice setting. We also conclude that it is not clear how much effective skills training can take place before a lawyer has had a significant exposure to private practice. These concerns as to the timing of skills training and as to the setting in which it best occurs are relevant in determining an appropriate role for educational institutions in our consideration of possible alternatives to the de facto apprenticeship system.

C. Bar Examination

3.1 Historically speaking, the primary function of the Bar Examination in Massachusetts has been to serve as a means of verifying that a student has attained an adequate grasp of the reasoning processes involved in applying relevant legal principles to particular fact situations. The principal purpose has thus been to test the applicant's ability to "think like a lawyer".

3.2 The Massachusetts Bar Examination does not purport to test an applicant's proficiency in applying law for the benefit of clients in given situations. As a result, the various Bar review courses available in the Commonwealth are not attempting to teach skills in the sense used in this Report.

3.3 There appears to be a general consensus that Massachusetts law schools are currently doing an adequate job of training lawyers to reason conceptually. The validity of that consensus appears to be borne out by the high passing rate among

graduates of Massachusetts law schools taking the Massachusetts Bar Examination in recent years.

3.4 The quality of law students (measured in terms of academic aptitude) and the quality of law school faculties (measured in terms of the prestige of the institutions from which faculty members obtained their own degrees and the academic standing of those faculty members while law students themselves) increased markedly during the '60s and '70s. Because of those increases in quality we conclude that the high passing-rate for the Massachusetts Bar Examination is probably a valid measure of the capacity of almost all current law school graduates to commence practice in a conventional de facto apprenticeship setting. Bar admission standards do not appear to have been relaxed; rather over-all applicant performance appears to have increased.

3.5 In Massachusetts, as in all other American jurisdictions, there is no examination or other objective mechanism for making a determination that a lawyer has in fact learned at some point how to practice law with competence in our sense of that term; i.e., proficient application of legal knowledge and reasoning processes.

3.6 Several of the federalized members of the British Commonwealth of Nations, e.g., Australia and Canada, have formal "Bar training" programs at the state or provincial level. These programs are conducted after law school and prior to admission to

the Bar and are not intended to duplicate law school courses*. During the course of such a Bar training program, the law school graduate takes a sequence of written examinations which focus upon the applicant's ability to apply legal principles and reasoning for the practical benefit of clients in particular areas of the law. The Ontario course is conducted over a six-month period by the Law Society of Upper Canada, which is the body which presents applicants to the Supreme Court of Ontario for admission to its bar. A copy of the student handbook for the Bar Admission Course given in 1979-80 is attached hereto as Exhibit E. The course description is at pp. 15-29.

3.7 The British Commonwealth model also provides for a formal period of apprenticeship prior to plenary licensure. In Ontario, for example, a Bar applicant is expected to receive a year's articulated clerkship experience in the substantive areas covered by a six-month Bar Training Course and is provided with a checklist of standard legal tasks to complete during the clerkship. See Exhibit E.

3.8 There is no substantial evidence that lawyers admitted to the Bar under the British Commonwealth model are more likely to become competent more quickly than do their American counterparts. The Canadian Bar is currently grappling with much the same concerns about competence as is the American Bar. However, we conclude that the Ontario model is still a useful one for our purposes.

*In fact, the Ontario course is currently being taught to some extent in a remedial mode because of the uncertain quality of some Canadian law schools. Such is not the intended purpose of the Bar Training Course, however.

For an analysis of the course in New South Wales, see "Curriculum Development for the Practical Legal Training Course", a copy of which is being filed with this report.

3.9 Over the last two decades, New Jersey, which is generally considered to be a comparable state to Massachusetts with respect to the size of its population, the industrialized nature of its economy, the degree of prosperity of its citizens and the cultural sophistication of its residents, has directly addressed the distinction between capacity to undertake practice and proficiency in the practice of law. For a period of time formal apprenticeships were required after law school and prior to admission to the Bar. However, it was found that the quality of the clerkship experience was so uneven as to be discriminatory, and the requirement was dropped. Then for many years New Jersey did not grant plenary admission to the Bar upon an applicant's passing the Bar Examination, but conditioned it upon satisfactory participation in an extended course of "how-to-do-it" lectures under the auspices of The New Jersey Institute for Continuing Legal Education, including completion of a set of written exercises in the practical application of legal principles and legal reasoning. As of February, 1982, the status of conditional licensure will be dropped, and the applicant will be required to complete the skills-training course in a satisfactory manner prior to admission to the Bar.

3.10 We have been informed that New Jersey's standards for grading the written exercises have not been as high as those which would be used to determine acceptable work in an actual practice setting; i.e., one could pass the written exercises without displaying what would otherwise be regarded as a minimum level of proficiency in applying legal principles to the solution of a particular task such as the drafting of a marital deduction

clause for a simple husband-and-wife will*. As a practical matter, virtually all applicants who passed the Bar examination went on to attain plenary licensure in New Jersey. Attendance at the lecture series has been non-compulsory. The quality of the practice manuals and of the lectures based upon those manuals is considered good-to-excellent, and the new lawyer who has taken advantage of the course has been afforded a valuable introduction to law practice. The director of ICLE informed us that he believes that an intensive bar training course along the Ontario model followed by an application-type of written bar examination should eventually replace the traditional bar review course and the classic bar examination in American jurisdictions. We conclude that there is much to be learned from the New Jersey model. A set of the documents pertinent to admission to the Bar in New Jersey is attached hereto as Exhibit F.

3.11 The representative of one of the Commonwealth's bar review courses on our Committee has advised us that his organization, which offers similar courses elsewhere in the Northeast, regards as inevitable and desirable an evolution of the traditional type of Massachusetts bar review course into a form of skills training program which prepares the applicant for a skills-oriented bar examination.

3.12 The Board of Bar Examiners has advised us that it has been considering for some time recommending to the Court the addition of a practical skills component to the bar examination.

3.13 Preparation for the Massachusetts Bar Examination is a

*This situation may change in the light of the recent formation of an Advisory Committee on Bar Admissions.

time of significant learning motivation for many law students. Bar review courses have no official role in the process of training lawyers in the sense that formal attendance at a law school or passing the bar examination do. At its best a bar review course, as presently structured, can afford the recent law graduate an opportunity to synthesize his law studies and to perceive as a whole a fabric which was divided into parts for ease of instruction in law school. On the other hand, that objective could equally be achieved if law schools were to give a comprehensive general examination as a prerequisite to a J.D. degree. A number of states, such as Wisconsin, do exempt the graduates of in-state law schools from a bar examination, presumably on the theory that their bar examiners are in a position to verify that graduation standards at such schools are adequate to ensure a competent bar. This finding should not be understood as an endorsement by this committee of licensure without public examination (a so-called "diploma license"), but only as an indication that licensure premised on an applications-oriented bar examination could be accomplished without ignoring fitness as established by the traditional type of examination.

3.14 It seems probable that the traditional bar examination could be successfully restructured to focus upon the applicant's ability to apply law for the benefit of clients, and still weed out any applicants who have not yet learned how to "think like a lawyer".

3.15 Thus, a two-tier system could feasibly be instituted for a plenary license to practice law in Massachusetts, in which the first tier would consist of establishing the applicant's ability to reason analytically. The second tier would consist of establishing the applicant's ability to apply legal principles and reasoning for the practical benefit of clients. A written examination could be imposed at both levels, as in New Jersey, or only at the second, as in Ontario. In our view an examination at the first level should be waived only if the applicant has successfully completed a comprehensive general examination as a condition of graduation from a law school regarded by the Board of Bar Examiners as having graduation standards comparable to those of the Massachusetts law schools.

3.16 California is currently experimenting with the feasibility of an alternate form of bar examination in which applicants are graded upon their actual performance of routine tasks--drafting legal briefs, interviewing witnesses, counselling clients, arguing motions, etc. The impetus for this experimentation has come not from an increased emphasis upon skills training per se, but from the pressure of various ethnic groups whose members sometimes do not handle the English language with facility. It is thought that certain applicants might be found competent to practice law even though they are unable to handle a traditional-type examination successfully. At the present time we are not in a position to determine to what extent

Massachusetts need concern itself with comparable issues.*

3.17 We conclude that a change in the character of the Bar Examination to test for skills levels could be accomplished in a manner which would not jeopardize objective verification of the analytical proficiency of would-be lawyers. However, we conclude that any experimentation in this area should be done cautiously because of the profession's relative lack of experience in teaching and testing skills. It may not be possible to devise a written bar examination which realistically measures an applicant's skills level.

D. Mandatory Practice Course

4.0 Any second-tier requirement for admission to the Massachusetts Bar should be preceded by a substantial period of special instruction, including demonstrations or other observation opportunities, with respect to the techniques and process knowledge necessary for successful practice; in short, by a mandatory practice course of some sort.

4.1 As noted in Finding 1-4, MCLE-NELI's existing "Practical Skills Series" reaches approximately 50% of all new lawyers in their first year of practice. That organization has the capacity alone, or as supplemented by the efforts of one or more for-profit organizations, to provide such instruction to all new lawyers after they have been notified that they have passed the Bar, but before they can be admitted. At present, there is a

*According to a news article in the August 27, 1981 edition of The Boston Globe, the Census Bureau recorded 141,043 Hispanics living in Massachusetts in 1980. See Exhibit G hereto. From inquiry at the Roxbury District Court it appears that adequate legal representation may not be available to the Commonwealth's Hispanic population from Spanish-speaking lawyers. See Exhibit H hereto.

period of two-to-three months between notification and admission during which such a course might be scheduled without undue hardship to the applicants.

4.2 Any experimentation with a mandatory practice course given after graduation from law school, but prior to admission to the Bar, should focus upon the skills of the would-be office lawyer as well as upon those of the would-be trial lawyer. We are absolutely satisfied that both types of law practice require a period of transition during which the young lawyer learns how to apply what he or she has learned in law school to actual practice situations.

4.3 Exhibit I to this Report contains a proposed rule for instituting a Mandatory Practice Course of our devising.

E. Continuing Legal Education

5.0 The most common form of what the profession has come to call continuing legal education is actually "continuing legal information"; namely, the provision of timely updates as to changes in the law.

5.1 Another common form of CLE is particularized process information: "How to Try a Case Before the Industrial Accident Board", "Estate Planning Dos and Don'ts", and so forth.

5.2 A more sophisticated, but relatively very expensive, form of CLE is the kind of intensive, highly personalized instruction offered by MCLE-NELI's Trial Advocacy Institute. That program is modeled upon The National Institute for Trial Advocacy and requires students actually to perform the trial lawyer's tasks and then receive an immediate critique on their performance from knowledgeable instructors.

5.3 The Harvard Law School's summer Program of Instruction for Lawyers also offers a uniquely valuable form of CLE. The Program offers intensive mini-courses in the traditional law school subjects and affords an excellent remedial opportunity for lawyers who did not study a given area of the law in law school or whose knowledge has become obsolete in a particular area. However, many experienced lawyers also attend the Program regularly in order to remain current in their own field. More important, PIL affords continuing access to classroom instruction that offers serious intellectual content and stimulation beyond information updates and remedial instruction in a field. The practicing lawyer can gain insight about a field's theoretical underpinnings, its jurisprudence, and its struggles with problems on the frontier that he or she may value for their contributions to general or theoretical enlightenment and intellectual appreciation of the business of the law. A copy of PIL's latest course offerings is attached as Exhibit J.

5.4 If, as we have previously noted, a new lawyer's full appreciation of the need for, and role of, skills training in attaining competence is most likely to emerge two-to-three years after passing the Bar, and if the ability to assimilate both types of skills training may also be significantly greater after two or three years of actual practice, then the development of programs which provide a high level of skills training is obviously a primary objective for any CLE organization.

5.5 Continuing legal education, as it currently exists in Massachusetts, does not provide a fully adequate opportunity for a new lawyer to develop professional skills and thus to become a competent lawyer in the sense used in this report. Training in professional skills must necessarily include a significant opportunity for "learning by doing" under the supervision of a qualified practitioner. Except in the area of trial practice, MCLE-NELI has only just begun to experiment with such hands-on education, and experimentation with the techniques for skills training for the office lawyer is barely nascent on the national level as well.* Even in the trial area only a relatively small number of lawyers can be accommodated by NITA-type programs and then on the basis of a very considerable (\$800. tuition) per capita expense.

5.6 It is possible for a competent lawyer to "lose" that competence through an excessive case load, counseling in an unfamiliar area, alcoholism, marital or other interpersonal stress, ill health or simple inattention to changes in substantive or procedural law. CLE programs address only the last of these possible grounds for loss of competence.

*In 1980 MCLE-NELI co-sponsored a three-day course with the American Bar Association in Business Lawyering Skills, which 24 Massachusetts lawyers attended. 48 lawyers attended a comparable Estate Planning Institute this spring. While MCLE-NELI has been in the fore-front of such activity, nationally speaking, it cannot yet be said that such education will surely prove feasible for training large numbers of lawyers.

5.7 MCLE-NELI is among the strongest non-profit continuing legal education organizations in the United States. Its present leadership is able and innovative. Its facilities and staff are capable of handling even greater responsibility for the evolution of skills training in the Commonwealth. The existing text which supports its Practical Skills Series is the best available how-to-do-it manual for Massachusetts practitioners.

5.8 The Massachusetts Bar Association and the Boston Bar Association are the joint sponsors of MCLE-NELI. The Massachusetts Bar Association also offers some legal education programs on its own. These programs mostly provide process knowledge of a highly practical nature; e.g., "Procedures at the Massachusetts Inheritance Tax Bureau".*

5.9 Among the other non-profit groups active in the delivery of CLE programs are the Massachusetts Association of Trial Lawyers, the Academy of Divorce Lawyers and the Middlesex Bar Association. Most of these organizations are primarily offering what are basically process knowledge in the trial area using an ad hoc faculty of highly experienced practitioners.

5.10 For-profit CLE organizations in Massachusetts, are vigorous, but tend to offer continuing legal information on an ad

*In many jurisdictions, e.g., California and New Jersey, the law schools within the state are also sponsors of state-wide non-profit CLE organizations. In Massachusetts, seats on MCLE-NELI's board are reserved for three law school deans.

hoc basis. At least one of these organizations, like MCLE-NELI, has the facilities, staff and will to play a significant role in increased skills training for young lawyers.

5.11 Prior to the formation of this Committee none of the Massachusetts CLE organizations, and apparently no national CLE organization, had yet purported to offer a coherent post-graduate skills-oriented curriculum in particular substantive areas of the law. However, thanks in part to the work of this Committee, the trustees of MCLE-NELI have recently taken some important steps toward such curriculum development. As of this fall, MCLE-NELI has introduced a course catalogue which groups its courses into four broad practice areas, designates the experience level for which each course is designed, and offers the courses on a periodic recurring basis. See Exhibit K. The four subject areas are to consist of Trial Practice, Estate Planning and Probate, Real Estate Transactions and Business Transactions.

5.12 Apart from the MCLE-NELI and PIL course catalogues, CLE offerings in Massachusetts are generally in a chaotic state from the practitioner's perspective. There is no clearing house for such programs with the result that several organizations may offer overlapping courses within a relatively short period. Except in the case of courses offered by MCLE-NELI and ALI-ABA, it is not always possible for a busy practitioner to determine the experience level at which a given program is directed, the precise program content or the probable teaching ability of the

faculty. Establishment of a general clearing house for all Massachusetts CLE offerings would be a service to the Bar.

5.13 There is something of a glut of CLE offerings, profit and non-profit, within the Commonwealth at the present. There is certainly a glut of such offerings from national for-profit CLE organizations such as The Practicing Law Institute, New York Law Journal, Harcourt, Brace & Javanowitz and others. The ALI-ABA Committee on Continuing Professional Education publishes monthly The CLE Register, which is "A Catalog of Continuing Legal Education Programs and Materials". Effectively all of the state-wide non-profit CLE organizations in this country are sponsors of the Register, which serves as "the national central directory for reporting programs, publications and audio-visual materials of all sponsors". Standards of Fair Conduct and Voluntary Cooperation urge sponsoring organizations of The CLE Register to agree to avoid programs which unreasonably conflict with or wastefully duplicate the programs of other sponsors. MCLE-NELI and Harvard's Program of Instruction for Lawyers are the participating Massachusetts organizations.

5.14 Massachusetts lawyers do not have any liaison group which is attempting to inform them on a comprehensive basis whenever changes in substantive and procedural law occur which are of general significance to all members of the Bar. The case digests in Massachusetts Lawyers Weekly have been a positive development in this regard, as has been MCLE-NELI's annual (now

semi-annual) publication of "Recent Developments in Federal and Massachusetts Law". While remaining current is clearly an individual responsibility in the first instance, it would benefit all Massachusetts lawyers significantly if some group were charged with informing them promptly as to current developments thought to be of general significance for the practice of law.

5.15 It would be reasonable to require lawyers to certify in connection with their annual registration with the Board of Bar Overseers that they had become familiar with those changes in Federal and Massachusetts law which had occurred during the preceding year and which were thought to be of significant concern to all licensed practitioners provided that some responsible group or organization such as MCLE-NELI or Massachusetts Lawyers Weekly had been designated in advance to advise the Bar as to those changes.

5.16 It would be well within this Court's inherent power to require an applicant for annual re-registration to establish to the satisfaction of the Board of Bar Overseers that he or she had indeed become familiar with such changes. It would also be proper for this Court to authorize the Bar Overseers to test applicants for re-registration in this regard using a randomly selected sample.

5.17 We are unable to determine the quantum of need for an annual certification of familiarity with changes in Massachusetts law of significance to all practitioners. We do believe,

however, that a minimum requirement of self-certification is likely to serve as an effective reminder of each lawyer's individual obligation to remain current with changes in the law.

5.18 Ten states have now imposed a requirement of mandatory continuing legal education, which typically consists of attendance at approved courses for 15 hours per year. See Exhibit L. As a committee, we are not convinced that compulsory participation in a stated minimum level of continuing legal education will necessarily raise the general level of competence within the Massachusetts Bar. However, we do call this Court's attention to the fact that 87% of the lawyers in Minnesota, as determined by a 1980 Minnesota State Bar survey, currently believe that mandatory CLE has improved their competence as practitioners. Minnesota requires 15 hours of CLE a year or its equivalent, a level which is the norm in the ten states which impose a CLE requirement. We are aware of no evidence which suggests that 15 hours of CLE a year, as opposed to five or 25 hours, is a level of remedial education well-calculated to ensure either the maintenance or the enhancement of competence. We are aware of no jurisdiction where mandatory CLE is in effect which offers any kind of a required course, such as "Recent Developments in Federal and Massachusetts Law", which might be thought to benefit all practicing lawyers. We are concerned that a 15-hour-per-year requirement would force many Massachusetts practitioners to attend programs of no particular interest to them, thereby tending to increase the cost of legal services without corresponding benefit to the public.

5.19 Compulsory attendance in this setting does not create a climate conducive to education of experienced practitioners. In the event of mandatory CLE in Massachusetts we are concerned that there would be largely pro-forma compliance with attendance requirements, a situation which would tend to diminish the value of CLE programs in the eyes of lawyers generally. In addition, a certain amount of bureaucracy would be necessary to police a mandatory CLE system--approval of programs, record-keeping, disciplinary proceedings and the like. While that cost could be imposed upon the Bar in the first instance, much of it would probably be passed along to the public in the form of higher legal fees.

5.20 There is a substantial argument that a conscientious lawyer engages in the necessary essentials of continuing legal education whenever he or she researches a problem before rendering advice to a client. However, we do recognize a danger that some lawyers confronted with relatively minor problems, particularly those lawyers who practice alone or in a small group, may sometimes be forced by economic considerations to render advice without adequate preliminary research. In such circumstances a lawyer who is operating on the basis of out-dated information may render inappropriate legal advice. On the other hand, it is not clear that requiring a lawyer to subject himself or herself to a given quantity of CLE every year is reasonably calculated to eliminate or even substantially reduce that risk.

5.21 The medical profession appears to be moving away from compulsory continuing medical education. See Henning, CLE

Reporter, July, 1981, p. 9, a copy of which is attached hereto as Exhibit M. The architectural profession has no such requirement although one has been discussed at the leadership levels of the profession. The accounting profession does have a compulsory continuing education requirement.

F. Certification and Specialization

6.0 There is no indication that any group within the Commonwealth is pressing for any form of compulsory specialization by Massachusetts lawyers as of this time. There is some pressure, particularly from such organizations as the American Trial Lawyers Association, for the establishment of a program to "certify" those tort trial lawyers who want to be able to designate themselves as trial specialists.

6.1 There is a very broad range of legal problems which can be handled competently by a qualified general practitioner. With the possible exception of trial advocacy there is no indication that there are particular skills (in the sense of techniques of applying law) peculiar to certain legal specialties. See, e.g., Zemans & Rosenblum, Preparation for the Practice of Law -- The Views of the Practicing Bar, 1980 A.B.A.F. Res. J. 1. Given time and care any generally competent lawyer should be able to master the substantive issues inherent in a given matter and to devise a strategy well-calculated to protect a client's interests. However, a generally competent lawyer who attempts to practice in a field where he or she has little or no prior familiarity is likely to find that it is difficult to obtain in a timely manner

and at reasonable cost to the client the particularized process knowledge necessary to function effectively.

6.2 Given the complexity of our society from the practicing lawyer's perspective, it is natural and inevitable that most lawyers should want to concentrate their practices to some extent and to hold themselves out to the public as being more than routinely competent in particular areas. It is our observation that voluntary concentration amounting to de facto specialization is already a well-developed aspect of legal practice in the Commonwealth today. Such voluntary concentration appears to have significantly increased the quality of the practice of law.

6.3 The profession has an obligation to its members and to the public to make sure that lawyers have reasonable access to post-J.D. skills training in particular areas of the law which interest them.

6.4 In this connection there is a significant difference between a program which culminates in a certificate of completion of post-J.D. training in a particular field and a program which permits an individual to hold himself or herself out as a specialist. A designation as a specialist connotes both substantial experience in a given field and continuing present concentration in that field. Thus, it can logically be conferred only upon those who are already de facto specialists.

6.5 We conclude that the greatest need in this area is not to certify who are the existing de facto specialists, but rather

to develop a series of training programs which will permit lawyers to acquire the type of skills which will enable them to concentrate their practices effectively in a particular field, or just a few fields, if they desire. Such a proposal addresses the underlying issue of the need for particularized competence to practice well in certain fields of law, but avoids the risk inherent in certification programs that those who are not eligible for certification will find it increasingly difficult to attain the necessary experience and percentage of concentration, because the work tends to flow to those already certified.

6.6 In the medical profession there appears to be a significant opportunity for a physician who has concentrated his or her studies in a particular field of medicine to make a living actually practicing in that area. This appears to be so because of the readiness of physicians to refer patients to each other. The existence of the American Society of Medical Boards and the willingness of most physicians to undertake the course of study necessary to become Board-certified in a particular specialty area has unquestionably tended to make Board-certified physicians feel professionally secure in referring patients to each other.

6.7 It is our collective observation that most new lawyers are unable to commence private practice concentrating in a particular field of their choice, but are forced to practice in those fields in which their clients or their firm's clients happen to have problems.

6.8 New lawyers have relatively little hope of entering into a specific area or areas of practice on their own at the outset of their careers. Many lawyers with substantial general experience, particularly those not practicing with large firms, also face difficulties in concentrating their practice within one field of law or a limited number of fields. Both groups generally lack access to the necessary formal training. And some perceive an economic need to practice in a number of areas of law because of the absence of any generally accepted means of informing the public as to their competence in a particular field.

6.9 The experience of the Massachusetts Bar Association suggests that there may be a considerable hidden demand for a roster of lawyers concentrating in particular fields. We have been informed by the executive secretary of the MBA that his office probably receives as many as 350-500 requests a year from lawyers seeking the names of lawyers concentrating in a given field. These requests are processed through a largely unadvertised service called the Lawyer-to-Lawyer Referral Service. The Bar Association maintains a file of resumes of those who have submitted their names to it as being qualified to accept referrals in particular fields. These resumes are then made available to those lawyers who inquire about competent counsel in those areas.

6.10 We are convinced that most experienced lawyers probably obtain the names of competent referral counsel by word of mouth. However, we are impressed by the number of lawyers who apparently find it profitable to hold themselves out to other lawyers by advertising their area of expertise in the Lawyer-to-Lawyer classified columns of Massachusetts Lawyers Weekly.

6.11 Ten American jurisdictions currently have some form of certification or designation program. See Exhibit N. For an analysis of these programs, including the ABA Model Specialization Plan, see Exhibit O to this Report. A copy of the ABA Model Plan itself is attached as Exhibit P. This Committee finds that certification proposals which are not based upon written examinations, peer affidavits and other objective indicia of professional competence are unworthy of further consideration by this Court.

6.12 We believe that continuing legal education organizations should be able to develop suitable programs for providing extensive skills training leading to a certificate that a lawyer has become competent to handle matters in a specific area of the law. We believe that a soundly conceived, practice-oriented curriculum can be developed in the obvious areas of legal expertise--such as labor law, securities law, estate planning and trial practice--which will provide skills training for lawyers who are then well-qualified to concentrate their practices in a particular field or fields after

approximately five-to-eight years of practice. If a lawyer diligently pursues such a curriculum in a particular area of the law, it is natural and appropriate to think in terms of certifying that such a lawyer has taken an important step towards competence to practice in that area. However, we do not equate the issuance of a certificate of completion of an extended training course as the equivalent of "certification as a specialist".

6.13 Development of the core curriculum for any such comprehensive training program should involve the formal participation of law professors and successful practitioners. Such a program would logically be conducted on a part-time basis over a period of three-to-five years, primarily in the evening, on weekends and during the summer months.

6.14 Massachusetts has unique assets to offer in any effort to develop a curriculum for post-graduate skills training in a particular field of law. The seven law schools in the Commonwealth offer both the quality of law faculty and the physical facilities to help make such training programs a success. Over the years the deans of the Massachusetts law schools have participated whole-heartedly in the continuing evolution of MCLE-NELI as the major source of post-J.D. instruction for Massachusetts lawyers. MCLE-NELI has already identified many of the practitioners who would have to be enlisted as skills instructors, and its staff has the experience to administer such a programs.

6.15 Other CLE organizations may well wish to participate in such an effort. However, a body or board appointed by this Court could provide useful coordination and leadership to avoid unnecessary duplication of offerings. If certificates are to be granted for completion of an "approved" course, then establishment of some such disinterested group of overseers is essential.

6.16 We see no incompatibility between the development of a series of skills-training curriculums for various fields of law and eventual implementation of the ABA Model Specialization Plan. The former could simply be deemed to satisfy some of the experience requirements recommended in the latter.

6.17 The abstract desirability of imposing a formal "experience requirement" as a prerequisite for conducting trials as lead counsel in the Superior Court depends upon the common sense proposition that proficiency tends to be a function of the frequency of prior performance of any task. However, the quality of trial experiences available to many new lawyers in the state courts is so uneven that we are concerned that it might well be seen as arbitrary to require some minimum number of trial experiences before allowing a lawyer to conduct a Superior Court trial. We do not mean to denigrate the importance of prior experience as a critically significant factor in providing representation of high quality during any trial. We only reject the notion that some minimal number of trial experiences will

tend to ensure a reasonably satisfactory performance as lead counsel before the Superior Court.

6.18 We believe that trial advocacy should be one of the extended post-graduate certificate courses offered by CLE organizations for lawyers three-to-eight years out of law school. Such an extended course would presumably include supervised observation of well-conducted trials as well as so-called hands-on training of the type pioneered by the National Institute of Trial Advocacy. In short, an appropriate training program for potential lead counsel should be implemented before potentially exclusionary standards are adopted for practice in the Superior Court Department*.

G. Peer Review

7.0 We repeat the finding that a competent lawyer may begin to perform consistently in a less-than-competent manner as a result of overwork, counseling in unfamiliar areas, alcohol or drug dependence, personal stress, poor health, or inattention to developments in his or her field(s) of concentration. The concept of "Peer Review", as developed by The ALI-ABA Committee on Continuing Professional Education, is intended to provide a structure to deal with all such phenomena. See "A Model Peer Review System" being Exhibit R hereto.

7.1 Bar Counsel has advised us that a very significant percentage of the grievances filed with the Board of Bar

*For the efforts of one jurisdiction in this area see the Release of the United States District Court for the Northern District of California, of which a copy is attached hereto as Exhibit Q.

Overseers relate to the area of professional competence. Were the Board of Bar Overseers publicized as a body authorized to deal with complaints about competence, Bar Counsel believes that the volume of that type of complaint might well be substantially higher.

7.2 We are not convinced as a committee that the Peer Review concept developed by ALI-ABA is a workable model for such problems of competence as Massachusetts lawyers may encounter from time to time. We doubt that judicial referrals would occur with any frequency. There is no mechanism whatsoever for referring lawyers who display incompetence as business lawyers. We do whole-heartedly accept the premise that any peer review program should be non-disciplinary in nature.

7.3 We have considered at some length the feasibility of establishing a non-disciplinary Peer Support Panel which could accept referrals from the Board of Bar Overseers of cases involving problems of competence not justifying serious disciplinary action, but warranting some remedial action intended to correct the underlying problem whatever it might be.

7.4 Bar Counsel is of the opinion that the Board of Bar Overseers would in fact make use of an option to refer certain situations involving less-than-competent performance to a non-disciplinary Peer Support Panel.

7.5 We believe that the Massachusetts judiciary might also make some use of such a Peer Support Panel if the latter were authorized to receive referrals from a judge who believed that a lawyer had performed before him in a less-than-competent manner. Such a referral would undoubtedly have to be of an entirely

"off-the-record" nature and require the uncoerced consent of the lawyer concerned if the program were to meet general acceptance from the Bar.

7.6 In any referral situation the Panel would be expected to investigate the matter and develop a remedial program for the lawyer if such a course appeared to be warranted. If a Peer Support Panel were created by rule of Court, we are of the opinion that its operations should not be obstructed by the attorney-client or work-product privileges. The members of the Panel should be regarded as if they were members of the law office of the attorney whose conduct was being reviewed. On a rare occasion a member of the Panel might have to disqualify himself or herself because of prior involvement with the matter under review or with the client whose matter was under review.

7.7 Statutory authority for disinterested inspection by a public official of the procedures followed in law offices and in the offices of other professionals, such as doctors, exists in Quebec. To the best of our understanding that authority has yet to be exercised.

7.8 It would be within this Court's inherent power to appoint a number of independent auditors to investigate the legal and financial practices and procedures of Massachusetts lawyers and law firms in their representation of clients and to recommend remedial or disciplinary action, where appropriate. Such auditors would presumably have to function on the basis of

reviewing a relatively small sample of single practitioners, of small-, medium- and large-sized firms and of corporate law departments each year. Such auditors would presumably be empowered to make suggestions as to means of improving methods of practice by a subject lawyer or firm, and, if necessary, to recommend suspension of the license to practice of those who declined to accept the auditor's recommendation.

7.9 This Committee does not believe that there is a need for a system of independent auditors based upon our perception that there are no signs of pervasive incompetence within the Massachusetts Bar at the present time. The Committee also questions whether independent audits, including the statistical probability of actually being selected for audit, would significantly improve the general quality of legal practice within the Commonwealth in any event.

H. Recertification

8.0 We have not yet considered in depth the problems raised by the concept of professional recertification. We are aware of no jurisdiction which is formally considering instituting such a requirement at the present time.

8.1 We are satisfied that any recertification program, to be effective, would have to include some objective verification of each attorney's continuing capacity to practice law. Re-examination as to the ability to reason analytically would doubtless meet great resistance from the Bar since such an

ability would rarely be lost, once gained. Legal skills, such as drafting, negotiating and counseling, do not by their very nature tend to become obsolete with the passage of time and might normally be expected to improve. Objective verification might plausibly take the form of a periodic examination as to developments in the law since passing the Bar Examination (say, every 5 or 10 years), but we have noted in Finding 5.15 that the Court can deal with the problem of stale information in connection with an active attorney's annual registration.

8.2 Any determination as to the need for a system of recertification necessarily depends upon an assessment of the extent to which Massachusetts lawyers tend to become incompetent due to the passage of time alone and of the extent to which it may be possible to measure competence objectively as of some given point in time subsequent to admission to the Bar.

8.3 To the extent that the public can be educated to refer competence problems to the Board of Bar Overseers, and to the extent that an effective structure such as a Peer Support Panel can be developed for the Board to deal with most such problems on a non-disciplinary basis, there will exist a mechanism for protecting the public against the danger that legal skills will become obsolete, and substantive knowledge out-of-date, through the passage of time.

8.4 Further thought needs to be given to two special problem areas--re-entry into practice following a period of

sustained inactivity as a lawyer and loss of analytical focus and decline in skills due to inevitable aging processes. We believe that the instances in which lawyers do not themselves find ways to cope with such problems are relatively rare. Nevertheless, further consideration needs to be given such matters by our successors.

I. The Scope of the Competence Problem

9.0 As a committee, we have concluded that there is no statistically valid method by which the Court can determine to what extent Massachusetts lawyers may be practicing incompetently at the present time. One highly respected justice of the Superior Court told us that in his opinion Massachusetts trial lawyers are in general quite competent, but have tended to take on too many cases during the recent years of calendar congestion with the result that they are frequently underprepared when reached for trial in any given cause. That source estimated that perhaps 5 to 8% of Massachusetts trial lawyers display signs of chronic incompetence. A vice-president of a major Boston bank also told us that in his opinion somewhat under 10% of all lawyers he sees in connection with estates, wills and trusts administered by his bank produce a product which reflects a distinct lack of competence.

9.1 A member of the staff of this Court conducted an informal review of the allegations which were made to the Board of Bar Overseers from January 1, to September 1, 1981, as to

misconduct by attorneys in Essex and Middlesex Counties in cases where no discipline was ultimately imposed. This review produced the following breakdown of those allegations:

Neglect of case and/or client -	95
Fee dispute -	74
Inadequate representation -	25
Escrow dispute -	20
Coercion, abuse, harassmt -	16
Refusal to pay (doctor, stenographer, broker) -	13
Conflict of interest -	12
Misrepresentation -	9
Failure to account -	9
Failure to return file -	8
Author emotionally disturbed -	8
Negligence -	6
Deficient title search -	5
Unfair collection practices -	5
Abuse of process -	4
Failure to return client's funds -	3
Refusal to take case -	3
Challenge to opinion -	3
Settling or stipulating without notifying client -	3
Inappropriate letter -	2
Prepared fraudulent account -	1

Issued bad check -	1
Abscond with fee -	1
Threatened arrest -	1
Acted as a witness -	1
Accessory to manslaughter -	1
Revealing confidences -	1
Retired but representing -	1
Refuse to talk with party -	1
Personality conflict -	1
Slandorous statements -	1
Partnership dissolution -	1
Failure to contact attorney -	1
Disagree on scope of work -	1
Served opposing party -	1

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9.1 A similar review was conducted for the period January 1, 1980 to September 1, 1981, as to allegations with respect to which some form of discipline was ultimately imposed. That review yielded the following results:

88 - Neglect of case:

estate - 25
other - 63

42 - Fees:

charging fee equal to one-third of the recovery without having written contingent fee agreement, or, doing so in a type of case where such an agreement is not appropriate - 26;

other disputes as to amount - 16

- 16 - Neglect of client (failure to advise as to status of matter, to return calls, or to correspond)
- 9 - Conflict of interest (a hidden personal interest in the transaction or representation of each side in that or another transaction)
- 6 - Withholding client's documents
- 4 - Threat of criminal action
- 3 - Fraud on or misrepresentation to the court
- 2 - Office mismanagement
- 2 - Inappropriate direct contact with opposing party
- 2 - Over-zealous representation
- 1 - Fee collection abuse
- 1 - Alluding to matters not in evidence
- 1 - Misreading of will
- 1 - Withholding witness fee
- 1 - Recommending self for employment
- 1 - Abuse of position

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9.3 An examination of complaints received during the period from January 1, 1979 to September 1, 1981, revealed that the Board of Bar Overseers imposed some form of discipline (ranging from private reprimand to disbarment) in 271 cases. In 172 (63%) of those cases, the discipline was imposed for conduct which may

be considered to indicate some measure of "lack of competence". (In the remaining 99 cases that failing may well have been subsumed in more serious misconduct.) Discipline was imposed in those 172 cases for 191 offenses. See Finding 9.1. Of those 191 offenses, 104 (54%) involved "neglect", which the Board classified either as "neglect of the case" (88, 46%) and/or "neglect of the client" (16, 8%). Another 42 (22%) were based upon inadequate or inappropriate fee arrangements. Thus, 146 (76%) of the offenses for which discipline was imposed involved questions of neglect and of fee arrangements. To the extent that disciplinary action by the Board of Bar Overseers provides one perspective on the issue of competence, it suggests the existence of a need for improved case management, client communication, as well as explicit and appropriate fee arrangements.

9.4 There is reason to believe that a lawyer's long-term level of competence is very often dependent upon the quality of his or her initial job experiences. As noted in Finding 1.9, it appears, but we cannot document, that many new lawyers are not receiving satisfactory initial job experiences at the present time. There is also reason to believe that the competence of experienced lawyers can be increased through skills training programs which encourage them to concentrate their practices in particular fields.

9.5 Through the various bar associations qualified lawyers can be found who are willing to serve as "mentors" for those

newly admitted lawyers who will not commence practice with an established office. A "mentor" can function either in a one-on-one, teacher-pupil relationship with a new lawyer or as the member of a panel of "area experts" to whom a newly admitted lawyer may be referred for specialized advice.

9.6 We see no reason to believe that problems of competence are limited to, or are in any way peculiar to, trial practice. The experience of Bar Counsel tends to verify that conclusion strongly on the basis of his personal experience with the character of the complaints about the performance of Massachusetts lawyers which have been brought to his attention.

9.7 Although no one has come forward to suggest that there is any kind of "competence crisis" facing the profession in Massachusetts at this time, the Committee has prepared its recommendations upon the assumption that there does exist at least a significant potential for such a situation to develop in the foreseeable future. However, we have also prepared our recommendations upon the further assumption that certain steps can usefully be taken to enhance the competence of the profession as a whole in any event. We urge this Court to evaluate our recommendations primarily in the light of that second assumption.

J. The Role of the Court

10.0 The traditional characterization of the legal profession as a largely "self-regulating profession" is

misleading. For example, in Massachusetts, none of the bar associations nor any other group of lawyers has any power to regulate professional conduct or standards. Even the Board of Bar Overseers can do no more than petition this Court to impose disciplinary sanctions upon a lawyer. Once this Court admits lawyers to practice before it, it currently chooses to "regulate" them only in situations warranting a reprimand, suspension or disbarment. However, we do find it useful to think of the Supreme Judicial Court as the body which has jurisdiction to regulate the legal profession in Massachusetts to whatever extent it chooses.

10.1 It is the direct and exclusive responsibility of the Supreme Judicial Court to ensure that every lawyer licensed to practice in the Commonwealth is capable of performing professionally under normal circumstances with that minimum level of proficiency in the application of law for the benefit of clients which we have called competence.

III. Recommendations

A. Legal Education

1.0 We have no recommendations to make at the present time as to the adequacy or inadequacy of a typical Massachusetts law school's curriculum from the point of view of skills training insofar as the subjects covered or the course content is concerned.

1.1 We recommend that a dialogue take place under the auspices of this Court between representatives of Massachusetts law schools and representatives of the Massachusetts employers of

law students to determine if there presently exists a needlessly excessive separation between the two groups in the area of skills training. The dialogue should include review of the extent to which summer clerkships and term-time placements might be integrated into a typical law school curriculum, including a measure of liaison between a law school's faculty and the supervising partners or other persons responsible for law clerks at their places of employment. The objective would be to provide perspective and context for the skills training which necessarily occurs during the course of such employment.

Comment

In making this recommendation we have in mind the possibility of fostering co-operation between law schools and employers to introduce more pedagogic content into pre-admission clerkships. We believe that it is worth determining whether an adjunct member of a law faculty working with a supervisor of summer law clerks in the case of a large office, or perhaps working directly with a single clerk in the case of a smaller office, could enrich the clerk's experience without jeopardizing either the attorney-client privilege or the law-office structure. We envision the possibility of an evolutionary process in which the law schools might gradually come to accept a greater measure of responsibility for the off-campus skills training of their students so that law graduates will be better able to practice law with competence as of the time that they stand for admission to the Bar.

Summer clerkships and term-time employment present excellent opportunities for supervised skills training to occur. (Supervision in this context probably means having the adjunct faculty member critique the student's work-product and comment upon adversary encounters witnessed by the law student.) Our recommendation at this point is limited to the desirability of conducting an initial dialogue in this

area under the auspices of this Court. The fact that there are obvious threshold problems does not relieve either the law schools or the employers of the obligation to enhance the educational quality of such clerkship experiences, if such can be done.

2.0 We recommend that this Court remain informed as to the status of the experimentation with academically supervised clinical education for third-year law students at The Legal Services Institute in Jamaica Plain.

Comment

We believe that the experience of Harvard and Northeastern with teaching a clinical third year of law school at The Legal Services Institute will provide valuable insights into the appropriateness of any major restructuring of the traditional law school curriculum so far as greater emphasis upon skills training is concerned. If our society comes to value justice as highly as it does health, pressure will mount for American law schools to accept direct responsibility for skills training via a third or fourth year of law school which takes place in a clinical setting. While a shift to such a model is seemingly years in the future, if ever, it is a sufficiently attractive approach to the institutionalization of skills training that the Court should remain well-informed as to developments in this area.

B. Bar Examination

3.0 We have no recommendations to make at this time as to the appropriateness of the substantive subjects covered by the present Bar Examination nor as to the quality of the examination questions, the fairness of the grading, or the level of what is considered to be an adequate performance.

4.0 We recommend that a dialogue take place under the auspices of this Court between the Bar Examiners, the

Massachusetts law schools, the sponsors of bar review courses and the profession generally to reach an initial understanding as to what might be involved in any restructuring of the Bar Examination to test proficiency in the application of law for the benefit of clients.

Comment

The Court should be alert to the possibility that the present Bar Examination has become something of an anachronism due to the general upgrading of the quality of law faculties and law students. Ninety-five per cent of the applicants pass it on either the first or second try. A shift in emphasis in the Bar Examination to conform to the Ontario model would necessarily convert the Bar Review Course into a Bar Training Course and might thereby make better use of the Bar applicant's time, money and motivation. Any change in the design of the Bar Examination should occur slowly and only after a substantial period of testing an alternate format.

C. Mandatory Practice Course

5.0 We recommend that participation in the equivalent of the MCLE-NELI Practical Skills Series be made a mandatory requirement for admission to the Massachusetts Bar as of July 1, 1982.

5.1 We recommend that this requirement lapse as of June 30, 1990, unless specifically continued in force by order of this Court entered prior to that date.

Comment

The existence of a death knell will place a burden upon the proponents of a Mandatory Practice Course to establish the value of such a program to those who were required to take it.

5.2 We recommend that the Board of Bar Examiners be given administrative responsibility for the Mandatory Practice Course.

Comment

Because the Board of Bar Examiners is extremely busy as it is, it may be necessary to appoint a Skills Training Advisory Committee to assist the Board in implementing a Mandatory Practice Course.

5.3 We recommend that any organization wishing to offer a Mandatory Practice Course be required to obtain the approval of the Board of Bar Examiners as to cost, course content and adequacy of teaching staff.

Comment

We have considered whether one organization should be given the exclusive responsibility for developing such a course. Such a course of action would tend to ensure sound fiscal planning, an important consideration since the Mandatory Practice Course may be a costly experiment. It would be helpful if the persons responsible for planning the content and the format for presentation of the course were able to engage in accurate budgetary planning based upon foreseeable enrollment projections. However, we have concluded that at this experimental stage it is better not to exclude any entity which wishes to offer such a course and can satisfy the Board that it is qualified to do so. There is no clear precedent as to how to teach an introductory skills training course. A diversity of providers would tend to encourage a number of different formats, each of which could subsequently be evaluated by the Board for its effectiveness.

5.4 We recommend that the Board of Bar Examiners engage in some experimentation with questions on the Ontario model which are primarily designed to test the applicant's ability to apply law for the benefit of clients.

Comment

Any experimentation with changing the nature of the Bar Examination will require coordination with the various bar review courses in the Commonwealth. We believe that it would be feasible for the Board to designate certain areas, such as general corporate law and conveyancing, where it might propound process-type questions; i.e., "what practical steps would you take

on behalf of a client in the following situation." We believe that an effort to teach and test "skills"--independent of the Mandatory Practice Course--in one or two limited areas would provide additional insight into this general subject matter.

5.5 We recommend that no examination be given upon completion of the Mandatory Practice Course during the experimental period. However, we recommend that the Mandatory Practice Course include voluntary participation in a series of exercises designed to demonstrate how a measure of proficiency in the application of law for the benefit of clients can be attained through close attention to the course materials. Attendance at the lectures should be compulsory.

Comment

The New Jersey written skills exercises, although both mandatory and graded, are not in fact inciting a competent skills performance, as we understand it. Our thought is to encourage, but not compel, the applicant to participate in a series of "practice" skills exercises. We believe that preparation for these exercises can become a significant learning experience.

5.6 The Mandatory Practice Course should consist of no more than 60 and no less than 30 hours of instruction through lectures and demonstrations, and, if feasible at a later date, through seminars, student participation or other forms of hands-on training. We recommend that the course be offered as a separately administered unit immediately following the Bar Examination.

5.7 We recommend that, if possible, the cost of the Mandatory Practice Course be held to approximately \$200 per applicant in terms of the purchasing power of the dollar as of

December 31, 1980. An effort should be made to obtain funds from Bar foundations and others so as to minimize additional Bar applicant expense during the experimental period.

5.8 We recommend that on or before January 1, 1990, the Board of Bar Examiners render a written report to this Court concerning the Mandatory Practice Course experiment, which report shall contain recommendations as to whether the course shall be made permanent; as to whether the emphasis of the Bar Examination can be effectively shifted to testing ability to represent clients in the kinds of settings which actually occur in practice; and as to the desirability of utilizing multiple providers in the continuing development and presentation of any Bar training course.

Comment

The lectures for the Mandatory Practice Course should assume familiarity with underlying Massachusetts law and might well specify the black-letter principles applicable to particular practice situations. The emphasis would be upon the practical application of those principles to particular factual settings. The long-range objective would be to develop a model Bar-training curriculum. The model curriculum should eventually include a component of hands-on training.

At the end of this decade the possibilities for skills training inherent in a Bar Training or Mandatory Practice Course should be evaluated in conjunction with the possibilities for such training inherent in a "clinical" third or fourth year of law school, the potential for restructuring the Bar Examination (and bar review courses) to emphasize skills development, and the prospect for greater academic involvement in summer clerkships and term-time employment. It is our belief that the Mandatory Practice Course offers some significant hope of "bridging the gap", but it may not be the final answer or even a part of the final answer. The program should terminate unless its supporters can demonstrate its value after a sustained experimental period.

5.9 A proposed rule for the implementation of this Recommendation is included within Exhibit I.

D. Mentor Program

6.0 We recommend that the various Bar Associations within the Commonwealth endeavor to provide a lawyer with five or more years experience in private practice as a mentor for every newly admitted attorney who requests such support. A board or body representing this Court should make the actual selections after reviewing the prospective mentors' qualifications. See Recommendation 7.0. The mentor should be designated as a Legal Advisor by this Court and should receive an appointment from this Court for a two-year term.

Comment

In a different setting the Harvard Law School has been experimenting successfully with matching its law students and its alumni in the Boston area in one-on-one relationships which are intended to give the law student a sense of involvement in the legal community. With thought and care in the selection of mentors and in matching them with new lawyers we believe comparable professional relationships could be established for all new admittees to the Bar.

6.1 A mentor should be prepared to serve for a two-year period without compensation and upon the understanding that he or she may not accept any referral, direct or indirect, from a pupil during the term of mentorship. A mentor should be free to accept a referral as to any matter arising more than two years after the pupil's admission to the Bar. A mentor should also be free to refer a case to a pupil at any time. A mentor should receive an honorarium if such is financially feasible.

Comment

The Commonwealth bar associations might be a source for providing funds for honoraria to mentors. An increase in the registration fees charged by the Board of Bar Overseers might also be considered as a potential source. The Boston and Massachusetts Bar Foundations might be willing to assist. In any event, even nominal compensation would enhance the mentor's sense of responsibility in our opinion.

6.2 A mentor should be expected to donate no more than a specified number of hours of professional time to each pupil in the first year after admission of the pupil to the Bar; and a lesser number of hours in the second year following the pupil's admission.

Comment

There should be some definite limit on the mentor's obligation to any given advisee. That limit should be decreased in the second year so that the advisee does not become dependent upon the mentor. We have in mind a total commitment to each advisee on the order of 25-to-50 hours over the two-year period.

6.3 A mentor should have no more than a limited number of pupils at any given time. A mentor should be eligible for reappointment.

Comment

We do not want to encourage certain lawyers to become "professional mentors". Therefore, there should be a limit, such as ten, on the number of advisees any given mentor may accept.

6.4 In conjunction with the designation of mentors by this Court we recommend that the various bar associations within the Commonwealth establish a rotating panel of lawyers experienced in various areas of the law to whom a mentor may refer an advisee

for consultation as to a particular matter. Access to a member of such a panel should be strictly limited to those new lawyers who have been expressly referred by their mentors. The panelist should be obliged to spend no more than a fixed amount of time on any given consultation and to provide no more than a fixed number of consultations a year.

Comment

It is self-evident that a conscientious mentor may not feel qualified to consult with an advisee as to a particular problem which arises in an area where the mentor has little or no experience. In such situations it would be appropriate to refer the advisee to a qualified member of the rotating panel which we propose.

The Atlanta and San Diego Bar Associations have experimented with this second phase of our proposal. It is our understanding, based upon somewhat sketchy information, that new lawyers have not tended to make use of this service. However, by recommending an initial phase of a personal mentor, who holds a Court appointment as a guarantee of disinterest, we are hopeful that new lawyers will elect to participate in the mentorship program we envision.

We have in mind that no consultation should last over two hours, and no panelist should be asked to participate in more than five consultations a year.

6.5 A mentor should offer consultation with a panelist solely in matters arising in private practice, including law office administration. A mentor or panelist should not offer, and the pupil should not accept, legal advice, but the two of them should consult solely as to techniques for resolving a particular problem or as to factors to be considered in evaluating a particular situation. The attorney-client privilege applicable to the pupil should be deemed to extend to the mentor.

The mentor should not, however, communicate with the pupil's client under any circumstances.

Both the pupil and the mentor should be exempted by rule of court from any and all liability for consultative advice rendered to, and acted upon by, the pupil to a client's detriment, but the Clients Security Fund should be liable without fault for any damage to the pupil or the pupil's client proximately resulting from advice rendered by the mentor and relied upon in good faith by the advisee.

A proposed rule for the implementation of this Recommendation is also included within Exhibit I.

E. Continuing Legal Education

7.0 We recommend the appointment of a board with general jurisdiction to assist lawyers in the attainment, maintenance and enhancement of professional competence following admission to the Bar.

Comment

With the erosion of the de facto apprenticeship system the burden of training young lawyers to practice competently is falling increasingly upon our CLE organizations. Without meaning to denigrate in any way the quality of the response to date by those organizations, we do want to urge this Court to consider creating a board of equal stature with the Bar Examiners and the Bar Overseers whose responsibility is to develop structures which will ensure a competent profession in a time of change.

7.1 We recommend that the Court continue to encourage and foster the development of voluntary continuing legal education in any other way that it can. In particular, the judiciary should continue to be encouraged by this Court to participate in non-profit CLE programs.

7.2 A prospectus and proposed rating should be prepared for every CLE offering within the Commonwealth and submitted to the board of general jurisdiction in this area for verification of the adequacy of the prospectus and of the suitability of the rating prior to any public distribution of the prospectus or advertising of the program and its rating.

Comment

Some central clearing house at the state level for CLE offerings is sorely needed. The board which we recommend would not pass upon program content except to approve or reject a proposed prospectus depending upon its adequacy of disclosure as to program content or the appropriateness of its representations with respect to the degree of experience which the program plans to assume on the part of the audience. However, the board should feel free to discourage CLE organizations from offering conflicting or over-lapping programs in some circumstances. It should also feel free to promulgate the Massachusetts equivalent of the "Standards of Fair Conduct and Voluntary Cooperation" promulgated by ALI-ABA for organizations sponsoring The CLE Register.

7.3 The Board of Bar Overseers should be empowered to require each active Massachusetts lawyer to certify on an annual basis that he or she has continued to maintain familiarity with developments of significance to the general practice of the law which have occurred in the period preceding the last prior registration. We recommend that such a certification be required on an experimental basis for a period of five years. We further recommend that responsible CLE organizations be invited to bid on a contract to prepare an annual summary of such developments which will be distributed to all persons seeking to re-register as active practitioners. The cost of the annual summary should

be assessed against the Bar as a whole via the dues charged by the Board of Bar Overseers.

Comment

All members of the Bar hold a plenary license to practice law even though no lawyer ever actually practices in all areas of the law. So long as lawyers receive a plenary, as opposed to a specialized, license, it is appropriate to expect them to master all current developments of significance to the practice of law generally.

7.4 We do not recommend the institution of mandatory continuing legal education for Massachusetts lawyers in the sense of annual participation in a fixed number of hours of CLE.

7.5 We recommend that the Massachusetts law schools encourage and foster the development of voluntary post-J.D. education for practicing lawyers in any way that they can. Among the steps that might be considered in this regard are the following:

a. Encouragement by the Bench and Bar of CLE offerings by law school faculty members in their substantive fields of law.

b. Access to library resources in a manner not inconsistent with a library's service to its primary patrons.

c. Instruction in new developments in the methodology of legal research.

d. Use of the law school's physical plant for CLE offerings at times which do not conflict with regular academic uses.

e. Sponsorship of CLE offerings in areas which are too specialized or otherwise appear to be economically unprofitable for traditional CLE suppliers.

f. Consideration of the development of formal graduate degree programs in areas other than tax. Compare Recommendation 8.0.

g. Inter-institutional cooperation in the development of CLE offerings.

F. Certification and Specialization

8.0 We recommend that MCLE-NELI with the assistance and support of interested Massachusetts law schools develop extended post-graduate, practice-oriented courses of study in the various obvious areas of specialized legal expertise such as estate planning, taxation, labor law and securities law. The objective would be to develop lawyers well-equipped to concentrate their practices in particular areas of the law after five-to-eight years of practice.

8.1 We recommend that the proposed board of general jurisdiction over issues of professional competence be authorized to designate those programs which should be empowered to grant such certificates.

8.2 At this time we recommend that such a certificate holder be entitled to hold himself or herself out to other practitioners, but not to the public, as having successfully completed an approved post-J.D. course of study in a particular area of the law.

8.3 We recommend that the Court continue to prohibit a lawyer from holding himself or herself out as a "specialist", or as one who is "specializing" in a particular field.

8.4 We do not recommend the establishment of an experimental certification program with a testing component along the lines of the experiments now being conducted in Texas, Arizona and California. We are absolutely opposed to any form of self-designation plan.

8.5 Until a post-J.D. training program has been successfully developed for lawyers who wish to acquire the skills necessary to concentrate their practices in particular fields, we do not recommend that any attempt be made to implement the ABA Model Certification Plan in this Commonwealth.

8.6 We do not recommend the implementation in the Superior Court Department of the Trial Court of the Commonwealth of any limitation upon the right of any licensed practitioner to appear as lead counsel without reference to the extent of his or her prior experience in the trial of cases.

G. Peer Review

9.0 We recommend that the Court authorize the proposed board of general jurisdiction in matters of professional competence to appoint lawyers from time to time to serve on a Peer Support Panel whose function shall be to investigate complaints about professional competence referred by the Board of Bar Overseers for non-disciplinary action and to devise and supervise remedial programs for such lawyers. Upon failure of a referred lawyer to participate in good faith in such a remedial program the Panel should be empowered to refer that lawyer back

to the Board of Bar Overseers for appropriate disciplinary proceedings in the light of the complaint(s) on file which led to the referral to the Panel.

9.1 The board of general jurisdiction whose creation we recommend should be authorized to devise remedial programs for lawyers re-entering practice after a period of suspension or disbarment. The purpose of these programs should be to reduce the risk of any re-occurrence of the situation which led to disciplinary action.

H. Future Activities

10.0 The Committee offers to continue in existence as an advisory committee to the new board. In the alternative, it offers to remain in existence as this Court's Special Committee on Legal Education and to continue its deliberations should the Court so desire.

10.1 If we are to remain in existence, the Committee recommends that the Court specify any additional areas of inquiry which it finds to be of particular promise or interest in order to focus our future work as much as possible.

10.2 If we are to remain in existence, the Committee requests that it be given the necessary funds to hire a Reporter and to pay his or her reasonable expenses or, in the alternative, that a reporter be appointed by the Court who is willing to serve without compensation.

